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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Administrator, CINCINNATI GAS & ELECTRIC COMPANY, *et al.*, MONONGAHELA POWER COMPANY, NORTH AMERICAN COAL CORPORATION, *et al.*, PEABODY HOLDING COMPANY, INC., *et al.*, TENNESSEE VALLEY AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CINCINNATI GAS & ELECTRIC COMPANY, *ET AL.*, MONONGAHELA POWER COMPANY AND TENNESSEE VALLEY AUTHORITY

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BRIEF IN OPPOSITION OF RESPONDENTS CINCINNATI GAS & ELECTRIC COMPANY, *ET AL.*, MONONGAHELA POWER COMPANY AND TENNESSEE VALLEY AUTHORITY [1]

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[1] The statement required by Rule 28.1 is appended as Attachment 1.

STATEMENT OF THE CASE

The Clean Air Act ("Act"), 42 U.S.C. §§ 7401 *et seq.*, in recognition of the fact that emissions cannot be constrained by state boundaries, provides a procedure whereby a state or political subdivision may seek a finding from the Environmental Protection Agency ("EPA" or "Agency") that any major source located in another state emits, or would emit, any air pollutant that will prevent the attainment or maintenance by the receptor state of any national ambient air quality standard ("NAAQS"), or that will interfere with measures required to be included in a federally mandated "State Implementation Plan" ("SIP") to prevent the significant deterioration of air quality or to protect visibility. This procedure is referred to as a "§ 126 petition."

This case results from EPA's rejection of claims made in § 126 petitions by three receptor states—Pennsylvania, New York, and Maine—that air pollution from Midwestern states was preventing the attainment or maintenance of certain NAAQSs and interfering with visibility. The rejection of these claims was upheld by a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit. The Petitioners here challenge the rejection of one of these claims.

In addition, Petitioners argue that the passage of a new interstate air pollution condition for the approval of SIPs "implicitly" required EPA to review previously approved SIPs and, further, that such review is required "for a specific case" of interstate air pollution raised by a § 126 petition. Petition for Writ of Certiorari [Pet. Cert.] at i. These contentions too were rejected by a unanimous court below.

The contentions raised by Petitioners are insubstantial and, in any event, do not merit review by this Court. The decision below does not conflict with the decision of any other court on the same matter, and does not decide an important issue of federal law that should be settled

by this Court. The petition for a writ of certiorari accordingly should be denied.

1. The Statutory Scheme

The Clean Air Act represents a carefully crafted partnership: EPA is to promulgate "national ambient air quality standards" designed to protect the public health (primary standards) and welfare (secondary standards), and the States are to develop, subject to EPA review, State Implementation Plans designed to achieve the federal standards. Under Section 110(a), States are required to adopt and to submit to the Administrator of EPA (the "Administrator") SIPs within nine months after the promulgation of a NAAQS, and the Administrator "shall approve such plan . . . if he determines" that it meets certain enumerated conditions. 42 U.S.C. § 7410(a)(2). In 1977, Congress adopted numerous amendments to the Clean Air Act,[2] including a provision significantly altering the condition relating to interstate air pollution for the Administrator's approval of a SIP. As a result of the 1977 Amendments, the Administrator

> shall approve such plan . . . if he determines . . . that . . .
>
> > (E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State . . . to protect visibility . . . .

Section 110(a)(2), 42 U.S.C. § 7410(a)(2).[3]

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[2] Clean Air Act Amendments of 1977, Pub.L. 95-95, 91 Stat. 685 ("1977 Amendments").

[3] *See* 1977 Amendments, § 108(a)(4), 91 Stat. 693.

The 1977 Amendments also added a new section to the Clean Air Act, providing that any state or political subdivision may "petition the Administrator for a finding that any *major source* emits or would emit any air pollutant in violation of the prohibition of Section 110 (a)(2)(E)(i)." Section 126(b), 42 U.S.C. 7426(b) (emphasis added).[4] The Administrator, "[w]ithin 60 days after receipt of any petition . . . and after public hearing . . . shall make such a finding or deny the petition." *Id.* If the Administrator finds a § 126(b) violation, a new source, if it is the violator, may not be constructed or operated, and if the offender is an existing source, it must either cease operation within three months or comply with such emission limitations and schedule designed to ensure compliance with the requirements contained in § 110(a)(2)(E) as expeditiously as practicable, but in no case later than three years after the finding. Section 126(c), 42 U.S.C. § 7426(c).

2. The Administrative Proceedings

The initial petition, filed by Pennsylvania on December 19, 1980, named 38 specific sources in Ohio and West Virginia as responsible for § 126 violations. Thereafter, Pennsylvania by letter supplement, New York by a series of petitions, and Maine in its petition, broadened the challenge to include all major—but unnamed—emitters of SO_2 and total suspended particulates ("TSP") in a broad group of Midwestern states.[5] The petitions[6] were

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[4] *See* 1977 Amendments, § 123, 91 Stat. 724.

[5] *See* Final Determination under section 126 of the Clean Air Act (Interstate Pollution Abatement), ("EPA Decision") *reprinted in* Appendix B, at B-3 to B-4. Five states were included in the Pennsylvania challenge and seven in the challenges filed by New York and Maine. New York at one point named 59 specific sources but then amended its petition to include all sources of SO_2 and TSP in the designated states. Maine at no time named specific sources.

[6] The States that petitioned EPA under § 126 are referred to as the "EPA Petitioners."

consolidated and subjected to extensive analysis by EPA which extended its review on several occasions to permit the receipt and analysis of additional comments from the Petitioners. The Agency also had the benefit of a broad spectrum of advice from other interested persons as well as analyses completed by its own experts. The record ultimately included more than 70 studies dealing predominantly with such highly technical issues as the reliability of long-range transport computer models, the uses and limitations of air trajectory analyses, the technical adequacy of air monitoring equipment, and the chemistry of the transformation in air of sulfur dioxide (a gas) into sulfate (a particulate). Indeed, in their brief below, Petitioners themselves recognized that:

> the existing record reasonably reflects the universe of relevant fact and informed opinion with respect to the several claims. The record is unquestionably the product of a lengthy record-building process fully open to all who wished to participate.

Pet. Br. at 49-50.

Based on this comprehensive record, EPA found:

> The evidence fails to demonstrate that sources in the named Midwestern States are preventing the attainment or maintenance of SO_2 or TSP NAAQS or interfering with PSD or visibility measures required to be included in petitioning States' SIPs.

EPA Decision, App. B-24.

3. The Decision Below

In the Court below, the Petitioners'[7] factual dispute with the Agency was remarkably narrow: all that remained in contention was Pennsylvania's claim that SO_2 from unnamed sources in Ohio and West Virginia were

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[7] The Petitioners below consisted of the EPA Petitioners, plus the States of Connecticut, Vermont, New Hampshire, and New Jersey, the Commonwealth of Massachusetts, and Richard L. Ottinger.

causing violations of the NAAQs for SO_2 in three discrete areas and Maine's claim that unnamed sources in the Midwest were responsible for isolated occurrences of regional haze in Acadia National Park. Opinion at A-12 to A-16 (as reprinted in Appendix A to Pet. Cert.) ("App. A-12 to A-16"). In a unanimous opinion written by Judge Sentelle, in which Judge Ruth Ginsburg concurred fully, the Court rejected Petitioners' challenge to the Administrator's resolution of these narrow factual issues. As to Maine, since its complaint rested exclusively on a claim of regional haze, and as its SIP neither contained nor was required to contain any regional haze visibility measures, the Court agreed that "Maine has failed to make even a threshold showing of entitlement under § 126(b)." App. A-13 (footnote omitted). As to Pennsylvania, since acceptance of its claim required acceptance of predictive models that the Agency found to be unreliable, and as "this Court is being asked to second-guess the scientific judgments of the EPA . . . [a]nd once again, we cannot say that the EPA's assessment of the scientific evidence was unreasonable," Pennsylvania's petition was denied. App. A-15.[8]

The Court below also unanimously rejected the Petitioners' legal contentions (1) that § 110(a)(2)(E) itself, or in conjunction with § 406(d)(2) of the 1977 Amendments,[9] required all states to revise their SIPs and to submit those revised SIPs to EPA for approval to assure compliance with the substantive conditions contained in that provision, and (2) that the filing of the § 126(b)

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[8] The Court upheld EPA's conclusion that air pollution models provided no reasonable basis for determining that violations of the national air quality standard for SO_2 were occurring in two of the three areas. App. A-14. The Court also upheld EPA's conclusion that the prediction by the model of a violation of that standard at one site in the third area was due overwhelmingly to in-state sources of SO_2, and that the out-of-state sources did not "significantly contribute" to the perdicted violation. *Id.* at A-15.

[9] This section of the 1977 Amendments is not codified.

petitions immediately obligated EPA to take the investigatory steps necesary to determine whether the SIPs in all named upwind states were in compliance with § 110 (a) (2) (E). App. A-8.

The Court pointed out that § 110(a) (2) contains no language directing the Administrator to reevaluate existing SIPs, even though "[w]hen Congress has intended to establish a requirement for direct EPA action it has said so." [10] App. A-10. The Court accepted Petitioners' contention that the substantive inquiry under §§ 110(a) (2) (E) and 126 are the same but observed that this "supports the Administrator's interpretation of § 110(a) (2) (E)," namely that the reevaluation and revision of existing SIPs was not required. App. A-8 to A-9. It noted that "[t]he language of § 126(b) is quite specific and focuses on 'major sources,' not the validity of a state's SIP." Thus, in a § 126(b) proceeding, the substantive standards contained in § 110(a) (2) (E) are to be applied to the "major sources" alleged in the petition to cause violations of those standards, and the § 126(b) proceeding does not require EPA to reevaluate the compliance of the entire SIP itself with the substantive requirements of § 110(a) (2) (E).[11] App. A-9.

This Petition for a writ of certiorari followed.

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[10] The Court noted that, by contrast, § 124 of the Act "*expressly* requires EPA to review the adequacy of existing plans with regard to dependence by major fuel burning sources on petroleum products and natural gas." App. A-11 (emphasis in original). Section 124 was added by the 1977 Amendments, 91 Stat. 722, the same legislation which included the version of § 110(a)(2)(E) on which Petitioners rely.

The Court's rejection of Petitioners' construction of § 110(a)(2) also was supported by its finding that the legislative history is "barren" of any suggestion of a requirement for direct action by EPA. App. A-11. As for § 406(d)(2) of the 1977 Amendments, that provision "merely addresses the timing of SIP revisions separately required by other provisions of the 1977 Amendments." *Id.*

[11] The Court below also noted that the statutory requirement for EPA to take final action on a § 126 petition within 60 days is inconsistent with Petitioners' construction of that provision.

SUMMARY OF ARGUMENT

Petitioners seek a writ of certiorari to have this Court pass on three issues: (1) whether § 110(a)(2)(E) "implicitly" directs EPA to review previously approved SIPs under that provision; (2) whether the filing of a petition under § 126(b) obligates EPA immediately to launch a review of the consistency of the SIPs of all named upwind states with § 110(a)(2)(E); and (3) whether § 126(b) affords relief for regional haze allegedly caused by interstate air pollution despite the absence of any regulation governing regional haze. Each of these questions was correctly resolved by the Court of Appeals and there is no conflict among the Circuits.

Moreover, even if the Petitioners were correct in their strained interpretations of §§ 110(a)(2)(E) and 126, the Administrator's conclusion, after the lengthy and comprehensive review of the factual allegations, that the "evidence fails to demonstrate that sources in the named midwestern States" are out of compliance with the substantive requirements of § 110(a)(2)(E), amounted to a determination that the SIPs in those midwestern states meet the amended condition for EPA approval contained in that section. The legal issues relating to EPA's review of SIPs under § 110(a)(2)(E) for which this Court's review is sought by Petitioners are thus not raised by this case.

REASONS FOR DENYING THE WRIT

I. Section 110(a)(2)(E) Does Not Mandate a Review of State SIPs

Petitioners' contention that the amendment to § 110(a)(2)(E) in 1977 somehow compelled the states and EPA to undertake a review of all SIPs was correctly and convincingly disposed of by the Court below.[12]

Petitioners attempt to mute the force of the Circuit Court's construction of the statutory language by citing

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[12] *See* pp. 6-7, *supra*.

scattered passages in the legislative history that show that Congress was concerned about interstate air pollution from existing sources when it enacted the provisions dealing with interstate air pollution in 1977. *See* Pet. Cert. at 9-10. This unexceptionable proposition does not support Petitioners' construction of either § 110(a)(2)(E) or § 126(b). Congress incorporated two specific mechanisms in the statute to provide for the "abatement of pollution from existing sources": [13] (1) the § 126(b) petition procedure with respect to a "major source," and (2) the requirement in § 126(a)(2) for each state to identify "all major existing stationary sources" that could "significantly contribute to levels of air pollution in excess of the [NAAQSs] . . . outside the State . . ." and to notify nearby states about such major sources by November, 1977.[14] The specific mechanisms created by Congress to address the legislative purpose have been fully complied with in this case.[15] The legislative history provides no support whatsoever for Petitioners' view that Congress "implicitly" created a third mechanism, directing EPA to review previously approved SIPs under the amended condition included in § 110(a)(2)(E).[16]

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[13] H.R. Rep. No. 294, 95th Cong., 1st Sess., at 330, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1409.

[14] Clean Air Act §§ 126(a)(1), (a)(2), (b), 42 U.S.C. §§ 7426(a)(1), (a)(2), (b). *See* H.Rep. 95-294 at 330-31; *compare* H.R. 6161 § 309(b) (95th Cong., 1st Sess., April 6, 1977), *reprinted in* 4 Senate Committee on Environment and Public Works, 95th Cong., 2nd Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, at 2446-47, *with* Clean Air Act §§ 126(a)(2), (b).

[15] The § 126(b) mechanism was utilized in this case, and as will be discussed in the next section, it was properly implemented by EPA. If Petitioners had any complaint with the adequacy of the identification and notice concerning major sources required by § 126(a)(2), they should have pursued that grievance more than 10 years ago. In any event, this case does not raise any claims under § 126(a)(2).

[16] The interpretation of the statute given by EPA and approved by the Court of Appeals—that § 110(a)(2)(E) does not mandate

II. Section 126(b) Does Not Mandate a Review of State SIPs

While Petitioners' position is a bit obscure, they appear to argue that upon the filing of a petition under § 126(b), EPA was obliged immediately to review the adequacy of the SIPs of all upwind states. The suggestion that the mere filing of a § 126(b) petition triggers a massive SIP review is at odds with the statute and with logic. As noted by the Court below, "[t]he language of § 126(b) is quite specific and focuses on 'major sources,' not the validity of a state's SIP." App. A-9 [17] Because of the Court of Appeals' thorough and convincing

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EPA to review previously approved SIPs to determine their compliance with the condition for EPA approval of SIPs added by that section—does not render that section meaningless. First, under EPA's interpretation, it must apply the condition in § 110(a)(2)(E) to any proposed amendment to an existing SIP before approving such amendment. Second, any submission of a new SIP by a State must be subject to the condition in that section before it can be approved. Thus, if Congress mandates EPA to establish a NAAQS for sulfates or acid rain, each State would be required by § 110 (a)(1) to submit a SIP which provides for implementation, maintenance, and enforcement of such standard within nine months of its promulgation, and EPA would subject each such SIP to review under the conditions of § 110(a)(2), including subsection (E), with respect to the new NAAQS. As noted by the Court below, "[b]ecause the Administrator's construction of § 110(a)(2) is consistent with the plain language of that provision and is a reasonable one, this Court must accept it." App. A-12, *citing* Chemical Manufacturers Association et al. v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837 (1984).

[17] It is not surprising that the section would focus on specific sources, in view of the drastic relief that follows a determination of a § 126(b) violation. *See* § 126(c), 42 U.S.C., § 7428(c). EPA Petitioners' failure to name specific sources alone justified dismissal of their petitions. That the Agency was willing to excuse this deficiency and to consider the possibility that out-of-state sources might be responsible for violations, hardly comports with Petitioners' attempt to portray a recalcitrant regulator.

rejection of Petitioners' contention, we will not repeat all the deficiencies inherent in Petitioners' claim.

Petitioners, by suggesting that weather systems in the Northeast periodically are "characterized by very high ambient sulfate levels, regional haze and acid rain" (Pet. Cert. at 8), attempt to suggest that this case involves important questions of national policy.

As discussed above, § 126(b) allows any state or political subdivision to petition the Administrator for a finding that a major source emits or would emit any air pollutant "in violation of the prohibition of Section 110 (a)(2)(E)(i)." That prohibition is against any stationary source

> emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such *National Primary or secondary ambient air quality standard*, or (II) interfere with measures *required to be included* in the applicable implementation plan for any other State . . . to protect visibility . . . .

(emphasis added). Thus, in pertinent part, the § 126(b) petition mechanism can provide relief only where a NAAQS is involved or where a visibility protection measure is required to be part of a SIP.

The assertion that Midwestern emissions create high ambient sulfate levels and acid rain cannot present an issue under § 126 because the NAAQSs do not directly regulate sulfates[18] or acid rain. Further, as discussed below, no provisions concerning regional haze are required to be included in a SIP. Any remedy—if one is needed—must come from the Congress, *see* App. A-17 (Ruth Ginsburg, J., concurring), or from EPA in re-

[18] Sulfate is a particulate, and as such it can be one component of TSP. Pennsylvania abandoned its claim in the Court of Appeals that Midwestern emissions caused violations of the NAAQS for TSP in Pennsylvania, and no party here challenges the disposition by the Court of Appeals of New York's similar assertion.

sponse to a petition to revise the NAAQSs or EPA's 1980 visibility regulations. 5 U.S.C. § 553(e) (1982); *see also Vermont v. Thomas*, 850 F.2d 99, 104 (2d Cir. 1988).

III. Allegations that Interstate Air Pollution Causes Regional Haze Are Not Cognizable in a § 126(b) Petition Proceeding

Section 126(b) is available to protect visibility measures "required to be included" in a SIP. The Court below upheld the Administrator's rejection of Maine's petition on the ground that regional haze is not regulated and is not covered (or required to be) in Maine's SIP. Because Maine did not present a claim that was cognizable under § 126(b), the Administrator, as the Court below correctly held, was obliged to deny Maine's petition. Maine's real complaint appears to be that the Agency is not moving fast enough with respect to the regulation of regional haze. But the relief available to Maine is to present its argument for regional haze control in a rulemaking petition to revise the 1980 visibility rules.[19]

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[19] 5 U.S.C. § 553(e) (1982); Vermont v. Thomas, 850 F.2d 99, 104 (2d Cir. 1988). The Court below did not sanction the indefinite postponement of "any national regulation of the problem." Pet. Cert. at 12. Instead, it noted that the timeliness of EPA action on regional haze was not an issue presented by Maine's § 126(b) petition. Indeed, as Petitioners acknowledge, "[t]he legality of this regulatory delay is being separately tested." Pet. Cert. at 13, fn. 8.

The Court went on to note that to the extent Maine is attacking the failure of the federal regulations which address what is required to be included in SIPs to protect visibility from regional haze, then it is "an untimely attack on the 1980 regulations. Such an attack is barred by § 307(b)(1) of the Act, which requires that judicial review be brought within 60 days of a final action by EPA." App. A-13 n.3.

IV. The Thorough and Lengthy Review of Petitioners' Claims in This Case Was the Equivalent of the Comprehensive Review of Midwestern SIPs Sought by Petitioners

Section 126(b) requires only that the EPA Administrator "make . . . a finding or deny the petition" within sixty days after receipt of a petition and after a public hearing. In response to the petitions in this case, EPA initiated an extensive administrative review of the claimed violations, compiling a detailed technical record which Petitioners conceded, in their brief below, "reasonably reflects the universe of relevant fact and informed opinion with respect to the several claims . . . . Pet. Br. at 44. The Administrator gave "the most sympathetic reading to the evidence presented by petitioners" yet he could not make "a finding of unlawful interstate pollution." 49 Fed. Reg. 34866 (Sept. 4, 1984).

Petitioners, understandably, do not ask this Court to review those highly technical findings by the expert agency to which Congress has entrusted responsibility for adjudicating § 126(b) claims. As to Pennsylvania's claims—of predicted, not monitored, violations—the Agency carefully reviewed the modeling data upon which the allegation of violations was based and concluded that the data could not credibly support regulatory action.[20] In two of the three geographic areas where violations of the NAAQS for SO_2 were alleged to occur, the data simply failed to provide a reasonable basis for concluding that violations existed. App. A-13 to A-15. As to the

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[20] Respondent Monongahela Power Company's Harrison Power Station, in Harrison, West Virginia, has already withstood a challenge by Petitioner Pennsylvania. In a SIP revision proceeding under Section 110(a)(2) involving nearly identical evidence to that in the instant case, EPA and the Third Circuit determined that the Harrison plant was not responsible for impermissible air quality impacts in Pennsylvania. 45 Fed. Reg. 74478 (Nov. 10, 1980); Pennsylvania v. Costle, 672 F.2d 902 (3rd Cir. 1981) (denying petitions for review).

remaining predicted violation, the Agency concluded that out-of-state sources did not "significantly contribute" to the predicted violation. The Court below correctly observed that "[o]nce again [it was] being asked to second-guess the scientific judgments of the EPA. Once again, we are at our 'most deferential,'" *citing Baltimore Gas & Electric Co., et al. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983). App. A-15.

In the final analysis, EPA undertook precisely the inquiry that would have governed the review of the Midwestern SIPs for their conformity with § 110(a)(2)(E). Petitioners concede that the substantive inquiry under § 126(b) is the same as that under § 110(a)(2)(E). In these circumstances, even assuming *arguendo* that the § 126(b) petitions were sufficient to trigger review of the Midwestern state SIPs, EPA's failure to state *in haec verba* that those SIPs have adequate provisions to prevent violations of § 110(a)(2)(E) in the petitioning States was, at worst, harmless procedural error.[21]

V. There Is No Conflict Among the Circuits

Petitioners contend that the decision below "is inconsistent [22] with decisions in three other circuits," referencing *Connecticut* v. *EPA*, 656 F.2d 902 (2nd Cir. 1981); *New York* v. *EPA*, 710 F.2d 1200 (6th Cir. 1983); and *New York* v. *EPA*, 716 F.2d 440 (7th Cir. 1983). Petitioners are in error.

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[21] There seems to be no difference even with respect to the burden of proof. First, EPA "accepted, for purpose of analysis, the most favorable view of the States' evidence." App. B-13. Second, EPA found that "the data already available suggest that the petitioners fall so far short of demonstrating entitlement to a finding under section 126 that the burden of proof is virtually irrelevant." *Id.*

[22] We note with interest that the Petitioners claim that the cited cases are "inconsistent with" rather than in conflict with the decision of the Court below. In fact, the cases are neither "inconsistent with" nor "in conflict with" the decision of the Court below.

As did the Second Circuit in the *Connecticut* case, the Court below assumed that the substantive standard was the same whether EPA was reviewing a SIP under § 110 (a)(2)(E) or reviewing a petition under § 126. There is no conflict on that point. Nor is there a conflict with the decisions of the Sixth and Seventh Circuits. In each of those cases, the Court merely held that EPA acted reasonably in approving a SIP revision governing a single source and in deferring determination of New York's claims that the cumulative SO_2 emissions from sources in the Midwest were having an impermissible effect on New York's ability to meet the NAAQS for TSP until disposition of the state's § 126(b) petition, which was then pending before EPA.

As we have shown, EPA did rule on the merits of New York's claims in the § 126 proceeding,[23] and the Agency and the Court below ruled on the merits of Pennsylvania's claims concerning SO_2. EPA did consider the cumulative impact of numerous sources in the § 126(b) proceeding, but found that "the evidence fails to demonstrate that sources in the named midwestern States are preventing the attainment or maintenance of the SO_2 or TSP" standards in the petitioning States. There is no inconsistency or conflict between the cited cases and the decision by the Court below. Petitioners failed not because the Agency or the Court below disagreed that § 126(b) is "the appropriate vehicle for considering the interstate impact if multiple sources" (Pet. Cert. at 13), but because the evidence did not support a finding of violation.

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[23] Those claims became moot while this case was pending in the Court of Appeals because of the revision of the TSP standards, and no party challenges the disposition of those claims.

CONCLUSION

For the foregoing reasons, this Court should deny the writ requested.

Respectfully submitted,

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December 22, 1988

ATTACHMENT 1

STATEMENT REQUIRED BY RULE 28.1

Allegheny Pittsburgh Coal Company
Allegheny Power Service Corporation
Allegheny Power System, Inc.
Allegheny Generating Company
American Electric Power Company
Appalachian Power Company
Centerior Energy Corporation
Cleveland Electric Illuminating Company
CMS Energy Corporation
Columbus Southern Power Co.
Commonwealth Edison Company
Consumers Power Company
Dayton Power & Light Company
Electric Energy, Inc.
Illinois Power Company
Illinois Power Finance Company N.V.
Illinois Power Fuel Company
Indiana Michigan Power Co.
Indiana-Kentucky Electric Corporation
Indianapolis Power & Light Company
IPALCO Enterprises, Inc.
Kentucky Power Company
Kentucky Utilities Company
Louisville Gas & Electric Company
Monongahela Power Company
Ohio Edison Company
Ohio Power Company
Ohio Valley Electric Corporation
Oxford Energy Company
Pennsylvania Power Company

PSI Holdings, Inc.
Public Service Company of Indiana, Inc.
Southern Indiana Gas & Electric Company
The Cincinnati Gas & Electric Company
The Potomac Edison Company
Toledo Edison Company
Union Light, Heat & Power Company
West Penn West Virginia Water Power Company
West Penn Power Company
West Virginia Power and Transmission Company